

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1254

To be argued by
RICHARD WILE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1254

UNITED STATES OF AMERICA,

Appellee,

—v.—

SILVIO V. SCOTT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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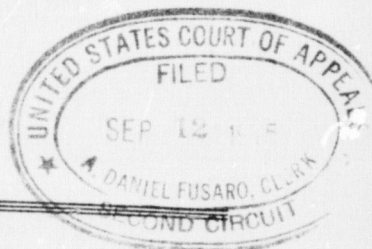


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**United States Court of Appeals
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Docket No. 75-1254

UNITED STATES OF AMERICA,

Appellee,

—v.—

SILVIO V. SCOTTI,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Silvio V. Scotti appeals from a judgment of conviction entered on June 23, 1975 in the United States District Court for the Southern District of New York, after a two day trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 75 Cr. 73, filed on January 23, 1975, charged Scotti in three counts with making and subscribing United States Individual Income Tax Returns for the calendar years 1968, 1970 and 1971 which he did not believe to be accurate as to the amounts of adjusted gross income for him and his wife, in violation of Title 26, United States Code, Section 7206(1).

Trial commenced on April 29, 1975 and concluded on April 30, 1975 when the jury returned guilty verdicts on all counts.

On June 23, 1975 Scotti was sentenced on Count One to a sixty day term of imprisonment and a \$500 committed fine, and on Counts Two and Three the imposition of sentence was suspended and Scotti was placed on probation for one year to commence upon his release from confinement.

Scotti is free on his own recognizance pending appeal.

Statement of Facts

The Government's Case

In 1968 Scotti sold metallic substances containing silver to Handy & Harman, Inc., a refiner of precious metals, on sixteen occasions (Tr. 44, 50).^{*} For those sales Handy & Harman issued checks to Scotti in the total amount of \$50,879.13 (GXs 1a-1p, 1aa-1jj, 1mm, 1oo, 1pp, 9; Tr. 45). Of those sixteen checks only seven, with the total value of \$20,354.20, were deposited into any of Scotti's bank accounts (Tr. 61, 78); the remaining nine checks, with the total value of \$30,524.93, were cashed at various banks (Tr. 62-63, 67D, 70-71, 76-77). Scotti's 1968 tax return, GX 1, did not include a Schedule C, Profit (Or Loss) From Business Or Profession. Scotti's reported adjusted gross income of \$10,742.56 for 1968 consisted only of \$10,643.28 reflected on W-2 forms as salary received from the New York City Police Department and from the United States Naval Reserve, of \$10.07 of savings account interest and of an \$89.21 state income tax refund (Tr. 23-24, 26).

In 1970 Handy & Harman issued four checks, GXs 2a-2d, to Scotti in payment for silver bearing metal (Tr. 45). The total value of those checks was \$8,239.17 (GX

^{*} "Tr." refers to the trial transcript; "GX" refers to Government's exhibit in evidence; "A" refers to Scotti's appendix.

9; Tr. 46-47). Only one of those checks, GX 2a, with a value of \$4,940.08, was deposited into one of Scotti's bank accounts (Tr. 61-62). Scotti's 1970 tax return, which did not include a Schedule C, reflected adjusted gross income of \$11,774.00, consisting of \$12,616.63 in salary listed on W-2 forms, a \$157.37 state tax refund and a \$1,000 long-term capital loss carry forward (GXs 2, 4; Tr. 26).

In 1971 Handy & Harman issued nineteen checks, GXs 3a-3s, to Scotti in payment for substances containing metallic silver (Tr. 45). The total value of the checks was \$25,195.88 (GX 9; Tr. 46-47). All nineteen checks were cashed at various banks (Tr. 62-63, 75). Scotti's 1971 income tax return did not include a Schedule C, and reflected adjusted gross income of \$14,312.89, consisting of \$14,579.12 in salary listed on W-2 forms, a \$133.77 state tax refund and a \$400 long-term capital loss carry forward (GXs 3, 4; Tr. 27).

Scotti was interviewed by Special Agent Robert Colasacco of the Internal Revenue Service on September 14, 1972 (Tr. 16). In addition to providing personal information Scotti stated that at least three-quarters of his gross receipts from Handy & Harman were consumed as the expenses of his silver transactions (Tr. 16-18, 36-37). Scotti failed to produce any records to substantiate that claim (Tr. 40-41). As the interview concluded Scotti asked how his transactions in silver had been detected (Tr. 18).

Scotti reported transactions in precious metals on his 1972 and 1973 tax returns after the interview with Colasacco. Schedule C of Scotti's 1972 return, GX 5, reflected receipts of \$49,404.88 and a net profit of \$14,780.08, approximately 30% of receipts (GX 7; Tr.

32-33). Schedule C of Scotti's 1973 return, GX 6, reflected receipts of \$67,765.54 and a net profit of \$28,112.38, approximately 40% of receipts (*id.*).

The Defense Case

Scotti testified on his own behalf. He recited that he was married, had three children, owned a mortgaged home, had been a New York City policeman for about eighteen years until approximately two months before trial, served in the United States Navy during the Korean War and had been in the Naval Reserve for twenty-one years (Tr. 86-89).

Scotti admitted selling silver to Handy & Harman from 1968 through 1971 (Tr. 90, 99-101). Scotti also admitted signing GXs 1, 2, 3 and 8, his tax returns for those years, and that the returns did not reflect his transactions with Handy & Harman (Tr. 97-102).

Scotti testified that GXs 1, 2 and 3, his 1968, 1970 and 1971 tax returns, were prepared for him by a man whose first or last name was "Andrews" (Tr. 95-96, 102). Scotti said he did not inform "Andrews" of the silver transactions, and admitted on cross-examination that he never asked "Andrews" or anybody else whether income from buying and selling silver had to be reported (Tr. 96-97, 102, 121). Scotti explained that he did not think it was necessary to report his silver dealings because he regarded the activity as a "hobby, an experimental thing," the interesting aspects of which were melting, shaping, remelting and reshaping the metal (Tr. 97, 123). On cross-examination, however, Scotti admitted that, because the same piece of silver can be remelted and reshaped forever, there really was no reason why he had to keep buying and selling silver in order to pursue his "hobby" (Tr. 123-24). Scotti also testified that he had not noticed that he warranted in signing his tax returns "under

the penalties of perjury" that the information in them was correct and complete (Tr. 98).

Scotti attempted to explain his cashing, rather than depositing, of Handy & Harman checks by the assertion that the people with whom he dealt insisted on cash (Tr. 91-92). However, on cross-examination, when pressed for the name of anyone who demanded cash from him, Scotti changed his testimony and said that the preference for cash was "more of a request than a demand" and that it was not necessary for him to pay cash for silver (Tr. 113-14). Scotti also stated that, despite his eighteen years as a policeman, it never occurred to him that his suppliers wanted to deal in cash so that they would be able to avoid reporting the transactions on their tax returns (Tr. 115-16).

Adele Scotti testified that she had been married to Silvio Scotti for twenty-one years (Tr. 171). She also testified that three savings accounts in trust for their children were the only bank accounts she and her husband had, individually or jointly, in 1968 (*id.*). On cross-examination Mrs. Scotti recalled that, in 1968, she and her husband had a joint checking account and that she had an individual savings account (Tr. 174-76).*

Ernest Filep, a New York City policeman and a member of the Naval Reserve, testified that he had known Scotti since 1966 and that he believed Scotti to be a truthful person (Tr. 184, 186).

* During cross-examination Silvio Scotti acknowledged that in 1968 he personally had a checking account and three savings accounts (Tr. 108-11).

ARGUMENT

POINT I

Scotti's arguments that the Government should not have been allowed to prove his profits from silver transactions are frivolous.

Scotti claims in Points I and II of his brief that it was error for the trial court to have permitted proof of Scotti's profits in 1968, 1970 and 1971 from silver transactions because such proof constituted a variance from the indictment and was irrelevant to Scotti's guilt under Title 26, United States Code, Section 7206(1). Those claims are absurd. The indictment alleged that Scotti's tax returns were materially false with respect to the amounts of "adjusted gross income" reported. Scotti's "adjusted gross income" on page 1 of his 1968, 1970 and 1971 tax returns should have included "income other than wages, dividends, and interest," calculated on page 2. Among the components of such "income other than wages, dividends, and interest" was "business income (or loss)" which should have been calculated on a Schedule C. The figure there calculated is "net profit or (loss)," i.e., gross receipts less the costs of goods sold and operations (Tr. 19, 36; 29A), and it is that figure which is included in "adjusted gross income". Obviously, therefore, in order to prove that the amounts of adjusted gross income reported by Scotti were false, the Government was required to prove that Scotti realized some net profit from his silver transactions.

POINT II

Scotti's claims that the introduction into evidence of his 1972 and 1973 tax returns was error are frivolous.

Scotti argues in Points III and IV of his brief that the District Court erred in admitting into evidence Scotti's 1972 and 1973 tax returns because they tended to establish neither the willfulness of the omissions of profits from silver transactions on Scotti's 1968, 1970 and 1971 tax returns nor the profitability of such transactions in 1968, 1970 and 1971. Those arguments are wholly lacking in merit.

First, the Government offered Scotti's 1972 and 1973 tax returns only as evidence of the profitability of Scotti's silver transactions in 1968, 1970 and 1971 (Tr. 4-7). The Government never, either in offering the returns or in closing argument, claimed that the reported profits from sales of silver in the 1972 and 1973 returns should be understood by the jury as demonstrating the willfulness of the omissions of similar profits from Scotti's 1968, 1970 and 1971 returns.

Second, the argument that the profits in silver transactions reflected on Scotti's 1972 and 1973 tax returns were inadmissible to prove similar profits during 1968, 1970 and 1971 is plainly without merit. Evidence that Scotti had made substantial profits in his silver transactions in 1972 and 1973 was certainly admissible to establish that his transactions during the earlier years charged in the indictment were also profitable, as Judge Frankel ruled (Tr. 7). II Wigmore, *Evidence* § 382 (3d ed. 1940). Cf. *United States v. Super*, 492 F.2d 319, 323 (2d Cir. 1974); *United States v. Nathan*, 476 F.2d 456, 459-460 (2d Cir.), cert. denied, 414 U.S. 823 (1973).

This evidence clearly "passed the rather low test of relevancy, 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Proposed Federal Rules of Evidence 401. . . ." *United States v. LaFroscia*, 485 F.2d 457, 459 (2d Cir. 1973). That the Government did not prove the conditions affecting the profitability of Scotti's 1972 and 1973 silver transactions were the same during 1968, 1970 and 1971 merely relates to the weight to be accorded the demonstration of Scotti's profits on sales in 1972 and 1973, not its admissibility. See *United States v. Super, supra*.

" * * * the evidentiary fact offered does not need to have strong, full, superlative, probative value, *does not need to involve demonstration* or to produce persuasion by its sole and intrinsic force, but merely to be *worth consideration* by the jury." I Wigmore, *Evidence, supra*, § 29 at 411, quoted in *United States v. Kahaner*, 317 F.2d 459, 471 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963).

See also *United States v. Barash*, 412 F.2d 26, 30-31 (2d Cir.), *cert. denied*, 396 U.S. 918 (1969). To the extent that Scotti's cost of goods sold could have been a higher proportion of his gross receipts in 1968, 1970 and 1971 than in 1972 and 1973, such information was peculiarly within Scotti's knowledge and could have been offered by him had the evidence from the 1972 and 1973 returns been misleading.* Cf. *United States v. Leonard*, Dkt.

* Scotti, who testified in his own defense, did not claim that the profits shown in 1972 and 1973 tax returns painted an erroneous picture of his profits in the earlier years charged, although on cross-examination he did claim halfheartedly that he was not sure that he had profits on silver transactions in 1968 (Tr. 121-22).

No. 75-1153 (2d Cir., August 28, 1975) slip op. at 5849-50. Certainly, together with Scotti's statement to Agent Colasacco that expenses consumed at least three-quarters — (but not all) — of his receipts from Handy & Harman, Scotti's refusal to produce any records to substantiate his claimed expenses, and the fact that Scotti engaged in numerous silver transactions throughout at least a six year period, it was helpful for the jury to be able to consider Scotti's undisputed profits in 1972 and 1973 in determining whether he realized any profits in 1968, 1970 and 1971.

POINT III

Scotti's request that the District Court take judicial notice of the income tax rates in effect for 1968, 1970 and 1971 was properly denied.

Scotti contends that, because the Government was permitted to establish his profits from silver transactions, the District Court, upon request, should have taken judicial notice of the income tax rates for 1968, 1970 and 1971 in order to permit a demonstration to the jury that the tax consequences of the income omissions for those years were "minimal" (Tr. 178). That contention is incorrect.

The basis of Scotti's contention is the erroneous premise that, because the Government proved Scotti's silver transactions in 1968, 1970 and 1971 were profitable, somehow the case was converted into a tax evasion trial under Title 26, United States Code, Section 7201 rather than a trial under Title 26, United States Code, Section 7206(1) for signing a false tax return. *See* Point I, *supra*. The issue under the latter statute was whether Scotti's adjusted gross income had been substantially understated, not how much additional tax he owed.

In *Silverstein v. United States*, 377 F.2d 269 (1st Cir. 1967) the defendant claimed that his failure to report less income than that involved in the present case was the result of negligence, not willfulness. Silverstein had not been allowed to prove that the additional tax would have been only a few hundred dollars, and was convicted for violating Title 26, United States Code, Section 7206 (1). The First Circuit affirmed Silverstein's conviction on the ground that the amount of additional tax liability was irrelevant to the question whether Silverstein deliberately or negligently understated his income in his tax return. The same reasoning is applicable to this case, in which the amount of Scotti's additional tax liability would have shed no light on his claim that he did not believe he had to report any income from his "hobby."

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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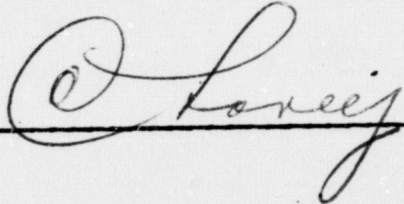
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Annabelle Chaney being duly sworn, deposes and
says that she is employed in the office of the United States
Attorney for the Southern District of New York.

That on the 12 day of September, 1975
She served 2 copies of the within brief by placing the same
in a properly postpaid franked envelope addressed:

SIDNEY MEYERS, ESQ.
51 Chambers Street
New York, New York 10007

And deponent further says that she sealed the said envelope and
placed the same in the mail drop for mailing at the United States
Courthouse, Foley Square, Borough of Manhattan, City of New York.



Sworn to before me this

12th day of September, 1975
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1976

